SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantic Automatic Sprinklers Ltd. v. Wolseley Canada Inc.* 2015 NSSC 302

Date: 20150724
Docket: Hfx No. 335139
Registry: Halifax

Between:

Atlantic Automatic Sprinklers Limited

Plaintiff

and

Wolseley Canada Inc., Wolseley Industrial Products Group Inc./Wolseley Groupe de Produits Industriels Inc., Ipex Inc., Ipex Management Inc., and LynCar Products Limited

Defendants

and

J.C. Whitlam Manufacturing Company

Third Party

And Between

Redden Brothers Development Limited

Plaintiff

and

Atlantic Automatic Sprinklers Limited

Defendant

and

Wolseley Canada Inc., Wolseley Industrial Products Group Inc./Wolseley Groupe de Produits Industriels Inc., Ipex Inc., and LynCar Products Limited

Third Parties

and

J.C. Whitlam Manufacturing Company

Fourth Party

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	July 23, 2015
Transcribed, edited, and released on:	October 23, 2015
Counsel:	C. Gavin Giles QC and Jeff Aucoin, for Atlantic Automatic Sprinklers Colin D. Piercey and Emma L. Halpin, for Wolseley Canada Inc., Wolseley Industrial Products Group Inc., Ipex Inc., and Ipex Management Inc. W. Harry Thurlow, for LynCar Products Limited Murray J. Ritch QC, for J. C. Whitlam Manufacturing Company Gregory E. Redden, for Redden Brothers Development Limited

Moir J. (Orally):

[1] *Introduction*. Atlantic Automatic Sprinklers Limited moves for an order requiring responses to five requests for information it made during discoveries of Ipex witnesses. The issues are whether the requested information is relevant, and if so, whether Ipex is capable of providing it.

[2] *Allegations*. Ipex Inc., one of the defendants, manufactures Blazemaster CPVC pipe sprinkler head adapters. Automatic Sprinklers designs and installs sprinkler systems in our region. It says that between 2003 and 2008, it purchased 37,000 Blazemaster sprinkler head adapters.

[3] Automatic Sprinklers alleges that Blazemaster sprinkler head adapters it used in 2007 and 2008 were defective. Leaks occurred at many sites where Automatic Sprinklers had installed sprinkler systems. Adapters had to be repaired or replaced and the company lost large sums of money, which it claims as damages for negligent manufacture or breach of contract.

[4] One of Ipex's grounds of defence is that the leaks resulted, not from any manufacturing defect, but from the way in which Automatic Sprinklers installed the adapters. These adapters connect the sprinkler head to the plumbing system

that delivers the water source. The adapters are cylindrical, plastic pipes with fittings on one end and threads on the other. The fitting fits into one of the pipes that carries water. The sprinkler head is threaded into the other end. The threading needs a sealer.

[5] Paragraph 37 of the defence reads:

> The Defendants Ipex Inc. and Wolseley Canada Inc. further state that the failures, if any, of the Ipex Blazemaster® sprinkler head adapters were due to causes unrelated to the alleged defective design, manufacture and supply thereof. In particular, without limiting the generality of the foregoing, The [sic] Defendants Ipex Inc. and Wolseley Canada Inc. state the failures were as a result of:
>
> (a) the use of incompatible lubricants, pastes and thread sealants;
>
> (b) faulty installation including overtorquing and misalignment of the sprinkler head adapters; and/or
>
> (c) such further causes as may appear.

This is the pleading that is most relevant to the present issue.

[6] In the background is Automatic Sprinklers' claim of negligent manufacture, which appears to have several aspects. There is a suggestion the wall thickness of the adapters was insufficient. Second, insufficient heat was used when the adapters were moulded. As a result of these two causes, the adapters did not knit properly to the system. Also, they cracked in places. Thirdly, the manufacturer's stamp intersected places of structural deficiency, making the problem worse.

[7] *Evidence*. The evidence on the present motion includes the following:

> At various times Ipex has manufactured and sold various different versions of 1" by ½" sprinkler head adapters. However, during the time periods at issue in this litigation, the different versions are as follows:
>
> - 1" by ½" sprinkler head adapter with a brass insert was manufactured from in or about the mid 1990s to in or about March 2001. (This design was similar to the design of the ¾" x ½" sprinkler head adapter design which appears to be the type installed by Atlantic Automatic Sprinklers during the time of the failures reported in or about 2000 and 2001.)
> - 1" by ½" sprinkler head adapter with a stainless steel insert (with the injection point on the flat part of the hex) was manufactured from June 2007 through December 2008. Sales of this version continued throughout 2009 and 2010. In August 2010, in anticipation of the within litigation, Ipex placed any remaining inventory of this version of the 1" by ½" sprinkler head adapter with a stainless steel insert (with the injection point on the flat part of the hex) in MRB.
> - 1" by ½" sprinkler head adapter with a stainless steel insert (with the injection point on the corner part of the hex) was first manufactured in February 2009. Sales have been made from March 6, 2009 to date.

[8] So, the adapters manufactured by Ipex in 2007 and 2008 are not the same as those it made in the mid-1990s. Nor are the manuals the same. The extent to which the changes in installation requirements were brought to the attention of Atlantic Automatic Sprinklers is in issue.

[9] The defendants, and the third and fourth parties, discovered Ipex's designated manager and a Mr. Randy Smith. Mr. Smith covered some of the subjects that might otherwise be in the acquired knowledge of a designated

manager, although they were outside Mr. Smith's immediate fields. This included questions by which the plaintiff sought to understand changes in Ipex's installation requirements between the period in the mid-1990s, the period in the early 2000s, and the period after June 2007 when the failure occurred.

[10] *The Requests*. Many requests were made of Ipex during the discoveries. Most resulted either in an undertaking or a decision to take the request under advice. These were fulfilled or satisfied, except for the five contentious ones that led to Automatic Sprinklers' motion. The contentious requests and the written responses read:

> **35. To advise why some IPEX instruction manuals include details on the insertion of sprinkler heads into sprinkler head adapters and some do not.**
>
> **Response:** *This undertaking was not given at the discovery and does not call for a response. As indicated in the transcript, it was requested that the question be directed to specific manuals and changes thereto. Without a specific question regarding a specific manual Ipex is unable to provide a response.*
>
> **36. To advise as to why the 1995 IPEX instruction manual does not reference the insertion of sprinkler heads into sprinkler head adapters. *UA**
>
> **Response:**
>
> *Ipex refuses to answer this undertaking on the basis it is irrelevant. This manual predates dates the failures at issue by in excess of 10 years and the 1995 manual had been superseded by the time of the failures at issue.* In any event, Ipex does not have any employees that date from that time period who have a recollection of the development of and content of manuals from that time period.
>
> **37. To advise as to why the 1996 IPEX instruction manual does not reference the insertion of sprinkler heads into sprinkler head adapters. *UA**
>
> **Response:**
>
> [Same as before.]

38. To advise as to how did IPEX determine that two turns beyond finger tight was approximately 10 to 20 lbs of torque in the 1996 manual. *UA

Response:

Ipex refuses to answer this undertaking on the basis it is irrelevant. This manual predates dates the failures at issue by in excess of 10 years and the 1996 manual had been superseded by the time of the failures at issue. In any event, Ipex does not have any employees that date from that time period who have a recollection of the development of and content of manuals from that time period.

40. To advise of why there was a change in the recommended installation method to ensure a sound connection from an earlier manual which contained two turns beyond finger tight (recommended torque values 10 to 20 lbs of torque), to one to two turns beyond finger tight (recommended torque values 12 to 25 lbs of torque) as referred to in the 2002, installation reminder. UA

Response:

Ipex does not necessarily admit the relevance of questions pertaining to installation methods in 2002. However, while reserving Ipex's rights with respect to relevance, Ipex no longer has an employee from that time period who can identify the precise reasons for the specific installation instructions. Generally however, recommended minimum number of turns and torque values are developed for each design of sprinkler head adapter in order to obtain a proper seal. As of 2002, Ipex was purchasing sprinkler head adapters from Spears and it is believed therefore that these recommended values originated from Spears.

[11] No undertakings were given on any of these subjects. So, Rule 18.16(6) on discovery undertakings does not apply. By combination of Rules 14.14(5), the apparent delegation to Mr. Smith, and Rule 18.13(1), Ipex is obligated to provide the requested information if the information is relevant (or it is likely to lead to relevant information) and if it is within Ipex's knowledge. By combination of these Rules and Rule 18.13(3), Ipex is obliged to produce documents within the same scope.

[12] *Relevancy*. The principles governing relevancy under the 2008 Rules are settled by *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32. Mere semblance of relevance is no longer enough. The chambers judge has to put himself or herself, as best as the judge can do, into the vantage of the trial judge and make a call on production, or answering a question, as if the judge were admitting or excluding the subject at trial as relevant evidence or irrelevant information.

[13] There is only one difference at the chambers level. Even if the information is itself irrelevant and therefore to be excluded at trial, the chambers judge will compel production, or an answer, if the result is likely to lead to relevant evidence. This serves the investigative aspect of discovery, but is itself confined by the relevancy, in the ordinary meaning of relevancy, of the object of the investigation.

[14] Information about the theory behind installation instructions for the 1990s adapters cannot tend to prove a fact-in-issue in this case because the defence has nothing to do with the 1990s adapters or the reasons underlying the installation requirements of that time. It has to do with mid-2000s adapters and mid-2000s installation instructions. It may also have to do with how and why Automatic Sprinklers installed sprinkler adapters and whether its practices changed with the

new practice and new instructions, and if not, why not. But, it has nothing to do with the underlying reasons for the instructions.

[15] As far as I can tell from the pleadings and evidence known to me, information about the theory behind the 1990s instructions cannot lead to uncovering relevant evidence about the careful or careless installation of the late 2000s adapters or the consequences of ignoring instructions created in the late 2000s. Similar considerations apply to request number 40.

[16] In my assessment, requests 36 to 38 and 40 do not call for relevant evidence or information likely to lead to relevant evidence.

[17] Automatic Sprinklers protests that when request 35 was made at discoveries, everyone knew what manuals were being talked about. Ipex says that the transcript shows specific references where required. It appears to me that the request is, in any case, covered by the present ruling. Why late 2000s manuals do or do not include the details referred to in the request may well be relevant and Ipex should respond to the request if Automatic Sprinklers can make it specific to those manuals only.

[18] *In the Knowledge of Ipex*. "I do not know." is an answer compliant with Rule 18.13, if it is truthful. A designated manager who gives that answer is subject

to cross-examination on his or her obligations under Rule 14.14(5), and may have to come back to discovery, make an undertaking, or respond to a request. Mr. Smith substituted for the designated manager.

[19] Some of the responses to the requests under review were taken by Automatic Sprinklers to mean only that Ipex was shrugging off the request because it had no remaining employees from that period who had knowledge; that is to say, from the mid-1990s, or in the case of the last request, the early 2000s.

[20] Shrugging off these requests is not usual. Usually, it is more economical to look for the requested information even if it is regarded as irrelevant. So, I asked Ms. Halpin about what effort had been made. Through her and Mr. Piercey, Ipex put on record in open court statements about the efforts made to find requested information and the results. These statements are there for Automatic Sprinklers to use if necessary.

[21] I am satisfied that Ipex diligently sought the requested information and it is not within Ipex's present knowledge.

[22] *Conclusion*. The motion of Automatic Sprinklers is dismissed. I am inclined to leave both the amount of costs and the liability for costs in the cause, unless counsel want to make an argument for a different approach.

[23] **Ms. Halpin:** I suppose we would suggest that costs should fall as a result in this situation as the motion has been dismissed but also because the motion could probably have been avoided if better communication had been made by the other party to phone or try to attempt to resolve this outside of court before bringing the motion.

[24] **Mr. Aucoin:** I'm fine, My Lord.

[25] Thanks, Ms. Halpin, but I am going to leave it as it was. I find it difficult to sort things out when we get at loggerheads about disclosure. Obviously, a huge amount of disclosure has been covered by the parties. So, there have been communications. You probably have a better shot with the trial judge than you do with me. And the argument that the result should govern liability for interlocutory costs can be made then as well.

Moir J.